SUBJECT INDEX

	Page
Questions presented	1
Statement	2
Argument	3
I. There is no final judgment or decree within the meaning of 28 U.S.C. §1257, and therefore this court lacks jurisdiction	3
II. Appellant presents no substantial federal question because, in the absence of any applicable federal regulation of the small loan business, California's nondiscriminatory regulation is clearly valid under the Commerce Clause of the United States Constitution	12
Conclusion	22
Appendix. Relevant California Financial Code sections not quoted in text	App. p. 1
California Administrative Code	App. p. 3

TABLE OF AUTHORITIES CITED

Cases	Page
Allgeyer v. Louisiana, 165 U.S. 578	9
Berry v. Maywood Mut. Water Co., 13 Cal. 2d 185, 88 P. 2d 705	4
Breard v. Alexandria, 341 U.S. 622	19
California v. Thompson, 313 U.S. 109	19, 21
Cox v. New Hampshire, 312 U.S. 569	12
Crutcher v. Kentucky, 141 U.S. 47	15
Edwards v. California, 314 U.S. 160	15, 19
Eli Lilly & Co. v. Sav-On-Drugs, 366 U.S. 276	15
Fuller, In re, 15 Cal. 2d 425, 102 P. 2d 321	13
Great Northern Ry. v. Washington, 300 U.S. 154	12
Independent Warehouse v. Scheele, 331 U.S. 70	19
International Shoe Co. v. Washington, 326 U.S. 310	20
International Textbook Co. v. Pigg, 217 U.S. 91	15, 19
Memphis Steam Laundry v. Stone, 342 U.S. 389	16
Mercer v. Hemmings, 170 So. 2d 33	19
Paul v. Allied Dairymen, Inc., 209 Cal. App. 2d 112, 25 Cal. Rptr. 595	5
Paul v. Virginia, 8 Wall. 168	20
Pellett v. Sonotone Corp., 26 Cal. 2d 705, 160 P. 2d 783	4
Pigeon Point Ranch, Inc. v. Perot, 59 Cal. 2d 227, 379 P. 2d 321	4
Perez v. Perez, 111 Cal. App. 2d 827, 245 P. 2d 344	10
Richfield Oil Corp. v. State Board, 329 U.S. 73	4, 10

Page

Robbins v. Shelby County Taxing District, 120 U.S. 489 16

Robertson v. California, 328 U.S. 440 ..... 16, 17, 18, 19, 20, 21

Sault Ste. Marie v. Int'l Transit Co., 234 U.S. 333 .. 15

Standard Home Co. v. Davis, 217 Fed. 904 20

State Board of Insurance v. Todd Shipyards Corp., 370 U.S. 451 9

Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 160 P. 2d 804 ..... 5, 9

Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049 4

Trower v. San Francisco, 157 Cal. 762, 109 Pac. 617 5

Union Brokerage Co. v. Jensen, 322 U.S. 202 18

United States v. Southeastern Underwriters, 322 U.S. 533 ..... 16, 17, 20

Wind v. Herbert, 186 Cal. App. 2d 276, 8 Cal. Rptr. 817 3

Statutes

California Administrative Code, Title 10, Art. 1, Sec. 1407 12

California Code of Civil Procedure, Sec. 462 10

California Code of Civil Procedure, Sec. 473 10

California Insurance Code, Sec. 700 17

California Financial Code, Sec. 24007 12

California Financial Code, Sec. 24200 ..... 2, 12

California Financial Code, Sec. 24206 ..... 12, 13

California Financial Code, Sec. 24405 2

California Financial Code, Sec. 24406 2

Page

California Financial Code, Sec. 24451 14

California Financial Code, Sec. 24452 14

California Financial Code, Sec. 24454 14

United States Code, Title 28, Sec. 1257 .....1, 3

United States Constitution, Art. I, Sec. 8, Clause 3.. 2

Rules

Revised Rules of the Supreme Court of the United States, Rule 16 1

Rules of the Supreme Court of the State of California, Rule 976(b) 2

Textbook

19 Law and Contemporary Problems, Henderson, The Future of the Loan Shark and Consumer Credit Agencies, pp. 127, 128 12

IN THE

Supreme Court of the United States

October Term, 1964
Misc. No. 1147

FAIRFAX FAMILY, INC., a corporation,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION TO DISMISS.

Respondent, pursuant to Rule 16 of the Revised Rules of this Court, moves that the appeal be dismissed (1) on the ground that the judgment appealed from is not a final judgment or decree within the meaning of 28 U.S.C. § 1257, and hence this Court lacks jurisdiction of this attempted appeal, or, alternatively, (2) on the ground that the question presented is so unsubstantial as not to warrant further argument.

Questions Presented.

1. Whether an order granting a preliminary injunction, affirmed on appeal by the District Court of Appeal of California, hearing denied by the Supreme Court of California, constitutes a final judgment or decree within the meaning of 28 U.S.C. § 1257, which limits review of this Court to "final judgments or decrees rendered by the highest court of a State in which a decision could be had."

2. Whether nondiscriminatory state regulation of an interstate small loan company's relations with local borrowers is valid under the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution in the absence of any applicable federal statute regulating those relations.

Statement.

The facts are fully and fairly presented in the opinions below. The opinion of the Superior Court of Los Angeles County, dated January 29, 1964, on the basis of which it issued a preliminary injunction on January 31, 1964 [Clk. Tr. 31], is printed as Appendix "B" of Appellant's Statement as to Jurisdiction. That injunction restrains, during the pendency of the action, appellant, its agents, and all persons acting in concert with appellant, from engaging in the business of soliciting, negotiating, or making loans in the amount of $300 or less, by mail or otherwise, unless and until appellant obtains a license in compliance with section 24200 of the Financial Code of the State of California.[1]

The unreported opinion of the District Court of Appeal,[2] affirming the preliminary injunction, is printed as Appendix "A" of appellant's Statement as to Jurisdiction.

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[1] Section 24405 of the California Financial Code states that no licensee shall transact the business licensed or make any loan provided for by the Small Loan Law under any other name or at any other place of business than that named in the license. Section 24406 states that licensees shall keep and use in their business, books, accounts, and records which will enable the Corporations Commissioner to determine if the licensee is complying with the provisions of the Small Loan Law and with the rules and regulations made by the Commissioner.

[2] Rule 976(b) adopted by the Supreme Court of California provides:

> "An opinion of a District Court of Appeal . . . shall be published in the Official Reports if it involves a new and important issue of law, a change in an established principle of law, or a matter of general public interest."

ARGUMENT.

I.

There Is No Final Judgment or Decree Within the Meaning of 28 U.S.C. § 1257, and Therefore This Court Lacks Jurisdiction.

The preliminary injunction appealed from specifies that it is effective "during the pendency of this action, or until the court shall otherwise order." [Clk. Tr. 31.] Its effect, under California practice, is limited to the preservation of the status quo until a hearing on the merits. *Wind v. Herbert,* 186 Cal. App. 2d 276, 283, 8 Cal. Rptr. 817, 821 (1960). It is not subject to appeal under 28 U.S.C. § 1257, which permits appeal only from "final judgments or decrees rendered by the highest court of a State in which a decision could be had." Appellant argues for an exception to the finality requirement on three bases:

1. *Law of the case.* "The decision of the District Court of Appeal in the California practice establishes the 'law of the case.' On the same or substantially similar facts in any further proceeding in the same cause, all State courts, appellate as well as lower, are bound to reach the same result." Jd. Statement, p. 10.

2. *Appellant's concession.* The "concession of an absence of any other or different facts bearing upon the federal question, which appellant has made in this Statement . . . [leaves] nothing more to be decided." *Id.* at 9.

3. *Conclusive admission of facts.* "The facts have been conclusively admitted.[3] They have, therefore, at

[3]Appellant cites note 2, page 5, of its jurisdictional statement which in turn refers to the effect to be given to pleadings and to affidavits of *Fairfax*. See page 10, *infra*.